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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOE MARQUEZ, Petitioner, vs. JEROME M. ARMANT, Respondent.	)	NO. 85-1305

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH F. WALSH
Attorney at Law
316 West Second Street
Suite 1200
Los Angeles, California 90012
(213) 627-1793

Attorney for Respondent
JEROME M. ARMANT

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JOE MARQUEZ, Petitioner, vs. JEROME M. ARMANT, Respondent.	NO. 85-1305 OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, JEROME M. ARMANT, hereby files this brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 24, 1985.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 772 F. 2d 552.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C., section 1254 and Rule 17 of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Does the state court have the right to deny a criminal defendant's constitutional right of self-representation on the grounds that the request for self-representation is untimely because it was made on the day set for trial but prior to jury selection?

2. Whether the record of the state criminal proceedings demonstrates that the Respondent, a defendant in a criminal action, made an unequivocal demand for self-representation?

3. Whether the state court's denial of Respondent's motion to continue his trial violated his constitutional rights of self-representation and to due process of law?

CONSTITUTIONAL PROVISION

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On February 11, 1981, an information was filed by the Los Angeles County District Attorney charging Respondent, Jerome M. Armant [hereinafter "Armant"] in Count I with arson on January 4, 1981, of an automobile owned by Claudette Williams. (C.T. 1) 1/

On February 11, 1981, the Los Angeles County Public Defender was appointed to represent Armant in defense of this charge. Armant was arraigned and entered a plea of not guilty. (C.T. 2)

On February 18, 1981, in Department Southwest K of the Superior Court of California, County of Los Angeles, before the Honorable Judge Edward Hinz, Jr., Armant, through his counsel Deputy Public Defender Michael Clark, moved the court to act as co-counsel or to represent himself. The motion was denied and the case was set for trial on March 30, 1981. (C.T. 3, Aug.R.T. 1)

1/ References are to the Clerk's Record and Reporter's Record on Appeal in the State court proceedings.

On March 30, 1981, the action was called for trial. Armant again moved the court to be appointed as co-counsel. The motion was denied. Armant then made a motion to represent himself and for a continuance so that he could prepare his defense. The motion was denied. (C.T. 5; Aug. R.T. 6-8)

On March 30, 1981, in Department Southwest B, before the Honorable John A. Shilder, the case was called for trial. Armant once again moved the court to be allowed to proceed in pro se, requesting a fourteen to twenty-one day continuance in order to prepare his case. The motion was denied. (R.T. 2-3) On March 31, 1981, the jury returned a guilty verdict. (C.T. 42-43, R.T. 43-45)

Armant was sentenced to prison for two years on June 8, 1981. He appealed his conviction to the California State Court of Appeal claiming that his constitutional right of self-representation under Faretta v. California, 422 U.S. 806 (1975) was violated. The conviction was affirmed because the Court ruled that the demand for self-representation had not been made within a reasonable period of time prior to the commencement of trial, citing People v. Windham, 19 Cal. 3d 121, 128 (1977). (Pet. for Cert. App.D, p.111). His petition for hearing in the California Supreme Court was denied.

Armant thereafter petitioned the United States District Court pursuant to 28 U.S.C., section 2254 raising his self-representation claim. The petition was denied without an evidentiary hearing, with the District Court concluding, from reading the transcript of the state court proceeding, that Armant did not make an unequivocal demand to represent himself. (Pet. for Cert. App.C, p.97-98) The District Court found his demand for self-representation equivocal because in addition to requesting self-representation, the record indicates that Armant made other motions including a request to be co-counsel, a request for a

different appointed counsel, and a continuance to retain private counsel. (Id.)

On appeal to the United States Court of Appeals for the Ninth Circuit, the judgment of the District Court was reversed with directions to grant the writ of habeas corpus reversing Armant's conviction. (Pet.for Cert. App.A) The Court ruled that Armant made a timely and unequivocal request for self-representation and it was error to deny his request. The Court also found error in the denial of his continuance motion.

STATEMENT OF THE FACTS

On February 18, 1981, Armant first stated his dissatisfaction with being represented by the public defender. At that time, Armant's attorney, Deputy Public Defender Michael Clark, told Judge Hinz that Armant wanted to be appointed as co-counsel. That request was denied. (Aug. R.T. 1) 2/ Mr. Clark further stated that Armant wished to represent himself and that Armant had a constitutional right to defend himself. (Aug. R.T. 1).

The court, without inquiring of Armant why he wished to act as co-counsel or whether he wanted to represent himself, ordered Mr. Clark to continue his representation of Armant. (Aug. R.T. 1). At that time, Armant wished to have Mr. Clark relieved as counsel and to be substituted in as counsel to represent himself. However, before he was able to communicate this request to the court, Armant was removed from the courtroom by the bailiff. (Aug. C.T. 8, R.T. 2) Disagreement arose between Armant and Mr. Clark as to the conduct of his defense. It pertained to what motions should be made, what witnesses should be called to testify and Armant's desire to review his preliminary hearing transcript. (Aug. C.T. 6-7)

2/ All references are to the record of the state court proceedings.

When the case was called for trial on March 30, 1981, Armant briefly communicated his disagreements with Mr. Clark to Judge Hinz. (Aug. R.T. 3-5) At that time, Armant requested Hudge Hinz to be allowed to proceed in propria persona. (Aug. R.T. 6) Judge Hinz stated to Armant that he had the right to represent himself. (Aug. R.T. 7) He asked Armant if he was prepared to go to trial at that time, if permitted to represent himself. (Aug. R.T. 8) Armant indicated that he would need fourteen to twenty-one days to prepare his defense. (Aug. R.T. 8) Judge Hinz then denied Armant's motion to represent himself and for continuance as being made untimely. (Aug. R.T. 8-9) The case was then assigned to Department Southwest B, Honorable John A. Shilder presiding, for trial. (C.T. 4, R.T. 1)

Armant renewed his motion before Judge Shilder to have Mr. Clark relieved as counsel and to have a fourteen to twenty-one day continuance to hire an attorney and subpoena witnesses. (R.T. 2-6) Armant and Mr. Clark both described to Judge Shilder the difference of opinion they had as to who should testify in Armant's behalf.

Armant expressed the opinion that he felt Mr. Clark had lied to him about the preparation and conduct of his defense; specifically, in regard to subpoenaing witnesses to testify for Armant. (R.T. 5) Armant's feelings were so strong that he refused to remain in court with Mr. Clark during the trial. (R.T. 3,5) The trial proceeded in Armant's absence. He remained in the lockup next to the courtroom during the one-day trial.

REASON FOR DENYING CERTIORARI

I

THE STATE COURT MAY NOT DENY A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION ON THE GROUNDS THAT THE REQUEST FOR SELF-REPRESENTATION IS UNTIMELY BECAUSE IT WAS MADE ON THE DAY SET FOR TRIAL BUT PRIOR TO JURY SELECTION

A criminal defendant has a right under the Sixth and Fourteenth Amendments to represent himself at trial. Faretta v. California, 422 U.S. 806, 807 (1975). In the Faretta case, this Court stated that the Sixth Amendment of the United States Constitution "implies a right of self-representation" for an accused in a criminal case. (422 U.S., at 821) This right may be invoked by an accused who "knowingly and intelligently" waives "the traditional benefits associated with the right to counsel." (422 U.S., at 835) The accused's "technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of his right to defend himself." (422 U.S., at 836) Rather, the accused "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." (422 U.S., at 835) If, after being appraised of his rights, the accused wishes to waive the right to counsel and represent himself, he has an absolute right to do so.

This Court noted that "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." Faretta v. California, 422 U.S. 806, 834 (1975). Notwithstanding the fact that his defense may ultimately suffer, an accused must be permitted to represent himself because the right of self-representation is directed more to the assertion of personal liberties than to the assertion of an effective defense. Thus, in the Faretta case,

this Court stated:

> To force a lawyer on a defendant can only lead him to believe that the law contrives against him.... The right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the life-blood of the law." (422 U.S., at 834)

In the Faretta decision itself, this Court only placed one limitation on the exercise of the constitutional right of self-representation. This Court, by citing its decision in Illinois v. Allen, 397 U.S. 337 (1970), mentions only disruptive in-court behavior in its discussion of when the right of self-representation can be terminated. This Court stated "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." Faretta v. California, 422 U.S. 806, 835 n.46 (1975)

In the case now before this Court, the issue presented is whether a criminal defendant may lose his constitutional right of self-representation if his request for self-representation is untimely. More precisely, the issue in this case is whether a request for self-representation made on the day set for trial, but prior to jury selection, is a timely request. In Respondent Armant's case, the Ninth Circuit held that his request for self-representation "was made before the jury was empanelled" and hence "was timely as a matter of law." Armant v. Marquez,772 F.2d 552, 555 (9th Cir. 1985). The Court relied upon two earlier

decisions of the Ninth Circuit which held to the same effect. Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir. 1982); Fritz v. Spaulding, 682 F. 2d 782, 784 (9th Cir. 1982).

As the Petitioner has pointed out in their petition for writ of certiorari, the Ninth Circuit cases are in conflict with the California Supreme Court on this precise issue. In People v. Windham, 19 Cal. 3d 122, 127-128 (1977), the California Supreme Court held that "In order to invoke the constitutionally mandated unconditional right of self-representation, a defendant in a criminal trial should make an unequivocal assertion of that right within the reasonable time period prior to the commencement of trial." The California courts have interpreted this language in Windham to mean that a self-representation motion made on the day the trial is scheduled to begin may be denied as untimely. People v. Hernandez, 163 Cal.App.3d 645 (1985). See also, People v. Hill, 148 Cal.App.3d 744, 757 (1983); People v. Fulton, 92 Cal.App.2d 972, 976 (1979). Although the Windham case involved an accused who requested the right of self-representation mid-trial, the Court did address the factual situation raised in the Armant case. The Court in Windham stated:

> Our imposition of a "reasonable time" requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the Faretta as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice. For example, a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and request a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of his request. In such a case, the motion for

> self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated he is not ready for trial and needs further time for preparation. (19 Cal. 3d at 128 n.5)

In contrast to the approach taken by the Californnia state courts is the approach taken by the Ninth Circuit Court of Appeals. See, Armant v. Marquez, 772 F. 2d 552 (9th Cir. 1985); Maxwell v. Sumner, 673 F. 2d 1031 (9th Cir. 1982); Fritz v. Spaulding, 682 F.2d 782 (9th Cir. 1982). These cases first determine whether the assertion of the constitutional right of self-representation is timely before proceeding to the next issue, whether a motion to continue the trial should be granted. The self-representation motion is the assertion of an absolute constitutional right. The continuance motion, on the other hand, is a motion that is subject to the discretion of the trial judge. All of the Ninth Circuit cases hold that a self-representation motion is timely if made before the jury is empanelled, unless it is shown to be a tactic to secure delay. Armant v. Marquez, supra, at 555; Maxwell v. Sumner, supra, at 1036; Fritz v. Spaulding, supra, at 784. See also, Chapman v. United States, 553 F.2d 886 (5th Cir. 1977); United States v. Price, 474 F. 2d 1223, 1226-27 (9th Cir. 1973). On the issue of delay, the Court in Fritz v. Spaulding stated:

> Delay per se is not a sufficient ground for denying a defendant's constitutional right to self-representation. Any motion to proceed pro se that is made on the morning of trial is likely to cause delay; a defendant may nevertheless have bonafide reasons for not asserting his right until that time, see Chapman, 553 F.2d at 888-89, and he may not be deprived of that right absent an affirmative showing of purpose to secure delay. (682 F.2d at 784)

Thus, the approach of the Ninth Circuit is the preferrable one. That approach recognizes that the right of self-representation is a constitutional right based upon an individual's personal liberties. As such, the denial of any timely motion for self-representation cannot merely be reviewed on appeal with an abuse of discretion standard. Finally, the Court creates a bright-line rule by noting that in all cases a self-representation motion is timely made if it occurs prior to empanelment of the jury and the start of trial. 3/

II

THE RECORD OF THE STATE CRIMINAL PROCEEDINGS DEMONSTRATES THAT THE RESPONDENT, A DEFENDANT IN A CRIMINAL ACTION, MADE AN UNEQUIVOCAL DEMAND FOR SELF-REPRESENTATION

The Petitioner correctly points out that the findings of fact of the District Court included a finding that the Respondent, Armant, did not make an unequivocal demand for self-representation. (Pet.for Cert., App.C, p.97-98) The finding of fact states:

> Moreover, it is not clear that Petitioner's ultimate desire was to proceed in pro se. Where it cannot be concluded that a defendant's demand to proceed pro se was unequivocal, no denial of the right to self-representation has occurred. Meeks v. Craven, 482 F. 2d 465 (9th Cir. 1973).

3/ Both the Fifth Circuit and the Second Circuit have stated that a self-representation motion is timely if it is made prior to jury selection. Chapman v. United States, 553 F. 2d 886 (5th Cir. 1977); United States v. Denno, 348 F. 2d 12 (2nd Cir. 1964). In the Denno case, the Court stated: "The right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial. [Citations] Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance [Citations]". (348 F. 2d, at 15)(emphasis supplied).

> Petitioner variously requested to be appointed co-counsel (on two occasions) to represent himself, to have new counsel appointed, and finally, to have his own retained counsel (which he now admits was not financially feasible [Mtn. for New Trial 1]). Thus, his equivocal demands did not entitle him to proceed pro se. (Pet.for Cert., App.C, pp.97-98)

It is true that pursuant to Federal Rules of Civil Procedure, Rule 52 that "Findings of fact shall not be set aside unless clearly erroneous..." However, under the facts of this case, the finding by the District Court that only an equivocal request for self-representation was made, is a clearly erroneous finding. Such a finding is not fairly supported by the record. See, Sumner v. Mata, 449 U.S. 539, 551 (1981); Rushen v. Spain, 464 U.S. 114 (1983).

The record in this case clearly indicates that on March 30, 1981, Mr. Armant request that he be allowed to represent himself. That request was put forth in writing on a prepared form supplied to Mr. Armant by the clerk of the court. After the form was filled out, the court then held a hearing on Mr. Armant's request. The issue of whether or not granting such a motion would necessitate a continuance was an issue that was raised by the trial judge sua sponte. In response to the court's inquiry about a continuance, Mr. Armant stated that he was not prepared to proceed to trial on that date and would be requesting a continuance of two or three weeks. The fact that Armant might make a motion to continue the trial was then used as the excuse for the trial judge's denying his self-representation motion. (Pet. for Cert, pp. 18-21)

The District Court in finding an equivocal request for self-representation, based that finding on the fact that Armant made other motions in addition to his self-representation motion. However, the fact that a litigant makes two motions does not thereby render either of those motions equivocal in nature. Rather,

Mr. Armant merely took it upon himself to make several motions, requesting to be appointed co-counsel, requesting a different appointed counsel, requesting time to retain counsel, and his self-representation motion. By making a motion to the court for the appointment of a different trial counsel, after his self-representation motion had been denied, Mr. Armant was not in any way withdrawing his earlier self-representation request. Since that motion had been brought and denied, Armant was simply pursuing another avenue of relief by requesting a different counsel.

Thus, the Court of Appeals for the Ninth Circuit in the Armant case was well within its authority to disregard the finding of the District Court that Armant did not make an unequivocal request for self-representation. Such a finding has no basis for support in the record in his case. Finally, whether or not a person has made an unequivocal demand for self-representation is a question of law for the appellate court to decide. Meeks v. Craven, 482 F. 2d 465 (9th Cir. 1973); Faretta v. California, 422 U.S. 806, 835 (1975). The District Court in this case was in no better position for finding the facts on the issue of an unequivocal demand for self-representation than was the Ninth Circuit Court of Appeals. Both Courts made their decision based upon an examination of the reporter's transcript of Mr. Armant's state criminal trial. Under these circumstances, the factual findings of the District Court on whether an unequivocal demand was made by Armant in the state court proceedings is a finding deserving little attention or weight.

III

THE STATE COURT'S DENIAL OF RESPONDENT'S MOTION TO CONTINUE HIS TRIAL VIOLATED HIS CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION AND TO DUE PROCESS OF LAW

Armant's self-representation motion was made on March 30, 1981, the day set for the commencement of his trial. Formal charges had been filed in the Superior Court for the County of Los Angeles on February 11, 1981. Thus, the self-representation motion occurred not only on the first date set for trial, but just seven short weeks after the original arson charges had been filed.

The trial did not start on March 30, 1981. It was trailed one day until March 31, 1981, when Armant made a motion to continue the case "from fourteen to twenty-one court days so I may hire an attorney of my own choosing." (Pet. for Cert. p.23) This was likewise denied by the state trial judge.

The Ninth Circuit Court of Appeals in this case not only found error in the violation of Armant's self-representation motion but also reversible error in the denial of his motion for a continuance. Armant v. Marquez, 772 F. 2d 552, 556-558 (9th Cir. 1952). The Court reviewed the facts of the case for an abuse of discretion. United States v. Flynt, 756 F. 2d 1352, 1358 (9th Cir. 1985); Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

The Court looked at four factors in determining whether an abuse of discretion occurred in the denial of the continuance. The Court first looked at the degree of diligence exercised by Armant prior to the date beyond which the continuance was sought. Secondly, the Court considered whether the continuance would have served any useful purpose if granted. Thirdly, the Court weighed the inconvenience that granting the continuance would have caused the Court or the Government. Finally, the Court examined the amount

of prejudice suffered by Mr. Armant from the denial of the continuance.

As noted above, the trial date that Armant sought to continue was the first date that the case had been set for trial. It was only seven weeks after formal charges had been filed in the Superior Court. The Ninth Circuit appropriately relied upon Powell v. Alabama, 287 U.S. 45, 59 (1932) in finding that the prejudice suffered by Armant was no less than the effective denial of his constitutional right to self-representation. In the Powell case, this Court stated "It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." (287 U.S., at 59)

CONCLUSION

Based upon the foregoing reasons, the Respondent urges that a writ of certiorari to review the judgment and opinion of the Ninth Circuit should be denied.

Respectfully submitted,

Joseph F. Walsh

JOSEPH F. WALSH
Attorney for Respondent
JEROME M. ARMANT

CERTIFICATE OF SERVICE

I, JOSEPH F. WALSH, a member of the Bar of this Court, hereby certify that on March 5, 1986 the foregoing OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

DONALD F. ROESCHKE
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010

Joseph F. Walsh
JOSEPH F. WALSH